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Supreme Court of the United States

October Term, 1957

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner*,

v.

MARY RUTH SPARKS, - - - - *Respondent.*

RESPONSE OF MARY RUTH SPARKS TO REPLY BRIEF OF WESTERN UNION TELEGRAPH COMPANY.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I. Under Kentucky Law the Question of Western Union Telegraph Company's Negligence Was Properly Submitted to the Jury.

The respondent, Mary Ruth Sparks, relies on the statements made in her Response to the Petition for Writ of Certiorari filed herein as to most of the points raised in the Reply Brief of Western Union Telegraph Company.

The respondent wishes to point out that in the Trial Court's decision reported in 141 F. Supp. 328 and adopted by the Circuit Court of Appeals for the Sixth

Circuit in 244 F. 2d 956, the question of the negligence of Western Union Telegraph Company in this matter is analyzed, and the arguments made here by Western Union Telegraph Company are answered completely under the Kentucky law.

By reading the evidence it is apparent that the statement of Western Union of the practice of the Louisville Gas & Electric Company in placing rivets in the holes is by "uncontradicted evidence . . . a spacious, haphazard and dangerous expedient," is not true. Adequate ventilation (66a) is available around the rivets and the cap for the escape of gases lighter than air (179a-180a). Gasses heavier than air will not escape regardless of the holes in the cover (71a). As for the "detailed study," counsel for the petitioner required a witness (73a), during a recess of the trial, to conduct an investigation of the use of rivets by the Louisville Gas & Electric Company, and rivets were found in the holes in the principal area of downtown Louisville (75a-76a). Mr. Bullitt's own associates (160a) reported to him that "in the principal area, or the important parts of Louisville . . . it was said that those manholes and the covers on them did not have holes in them." Moreover, there was never any agreement that this practice became a safety hazard. If there was ever a witness discredited on cross-examination, Mr. H. T. Meiners was it (115a-125a). Certainly, there was a jury question here presented on a conflict of evidence.

Western Union has insisted on bringing into this case the condition of manhole covers in other cities.

On page 5 of the Reply Brief an argument is made based on the manhole covers located at West Broadway and Thomas Street in New York City, New York. The writer has been to New York City, but I am, unfortunately, not familiar with West Broadway and Thomas Street. But the writer knows the situation in Louisville, Kentucky, where the accident occurred and where the evidence in this case clearly establishes from Western Union's own witness, F. W. Russell, that for a period of fifteen years (178a-180a) it has been the company policy of the Louisville Gas & Electric Company to place rivets in the holes in its manhole covers, especially when located in crosswalks for the purpose of the removal of the hazardous condition here presented (65a). As pointed out by the trial Court in its Opinion, there is evidence of a better and safer method, especially in crosswalks, of utilizing manhole covers to eliminate this hazard. In addition to the foregoing, it is true that in the very crosswalk here involved, there is a solid cover over a hole the same size as the manhole here involved. In the last five years Southern Bell Telephone Company has not placed in crosswalks any covers with holes in them (154a). The Trial Court correctly analyzed the problem in its Opinion and concluded that in this situation it was a jury issue as to whether or not Western Union was negligent. For the same reasons it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari on this basis.

Southern Railway Company v. *Walters*, 284 U. S. 190, 76 L. Ed. 239, 52 Sup. Ct. 58, is not applicable,

for in that action there was no proof that a train did not stop and flag as required by the Illinois Commerce Commission prior to crossing a road which was alleged to be the negligence involved. Here, it is undisputed that Mrs. Sparks fell in the hole in the manhole cover belonging to Western Union. There can be no doubt that the hole caused her to fall. Thus, there is no question of proximate cause as there was in the Southern Railway case. Under the doctrine of *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 Sup. Ct. 740, it is respectfully submitted that there is certainly a jury issue in this matter. Under *City of Louisville* v. *Haugh*, 157 Ky. 643, 163 S. W. 1101, this question is for the jury.

McQuillan v. *City of New Orleans*, 18 So. 2d 218 (La.), has been previously distinguished at page 25 of the Response. The case certainly does not overrule *Holbrook* v. *City of Monroe*, 157 So. 566 (La.).

Corthell v. *Great A. & P. Tea Company*, 291 Mass. 242, 196 N. E. 850, 851, is not in point because the proof was not the same. There, a woman caught her heel in a hot-air register, having approximately seventy-two openings seven-eighths of an inch square. Evidence was introduced as to the fact that such registers were in common use. The Massachusetts Court specifically pointed out at page 851 that the fact a certain device or practice is in common use tends to show that the use is not negligent. But that fact is not conclusive of due care, for a large number of persons may be wanting in due care in their usual practices. The Court noted that while the register was in common

and general use, the plaintiff had the burden of introducing evidence warranting a finding of negligence. The Court specifically noted that the defendant's evidence as to common use was uncontradicted, and stated as follows:

> "There was no evidence that registers with smaller openings were in common use."

On page 852 the Court further stated:

> "If, however, the vagaries of fashion had indeed brought into common use for such purposes heels of that description, there is no evidence how long they had been in vogue."

The present case is very different, for here it is clearly shown that the Louisville Gas & Electric Company has anticipated for approximately fifteen years this danger and has taken steps to guard against it in its manholes in the city of Louisville. The petitioner has quoted the Massachusetts Court at page 851, as follows:

> "When the Court can see that the physical facts, with any other evidence that may exist, do not warrant the inference that a reasonable man in the position of the defendant would have anticipated the danger and guarded against it, a verdict for the plaintiff is not warranted."

The appellee submits that the corollary of the statement of law is also true; that if the evidence *does* contain facts showing that a reasonable man in the defendant's position would have anticipated the danger

and guarded against it, then the defendant is not entitled, certainly, to a directed verdict. Thus, the evidence in the two cases is different, and the Corthell case is not authoritative in this situation.

II. The Question of Whether or Not Mrs. Sparks Was Contributorily Negligent Was For the Jury.

It is undisputed that Mrs. Sparks had not crossed this intersection for better than two months prior to the accident (47a). Mrs. Sparks had a duty to watch out for traffic as well as to observe where she was walking. The Kentucky Court of Appeals in the recent case of *Farris* v. *Summerour,* 296 S. W. 2d 708, 710 (Ky.), has stated, concerning the look and see rule upon which the petitioner relies, that there is a duty to see what is obvious or in plain sight unless some excuse is shown for not seeing the object. In the Farris case the Kentucky Court did not apply the rule and did not hold the driver contributorily negligent as a matter of law, for there was an excuse. The watching for traffic at an intersection is certainly such a legal excuse as to justify not seeing the hole. *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387; *25 Am. Jur.,* "Highway," Section 468, page 760.

Mrs. Sparks' testimony was that she did not see the hole in which her heel went (29a) and that she was watching for traffic while crossing the street in the crosswalk (29a). While watching the traffic, she was not looking directly at her feet and did not see the cover or the holes (47a-48a). Certainly, under these

circumstances the mere stepping on a manhole cover, especially when some are solid or have rivets in the holes, does not amount to contributory negligence as a matter of law.

On page 12 and 13 an effort is made to minimize the lookout required by Mrs. Sparks in crossing the street. There is no dispute that Mrs. Sparks was walking in the crosswalk and that this manhole cover upon which she fell was in the crosswalk. The traffic moving east and west on Market Street had stopped (28a), but that does not mean she did not have to watch these vehicles. Traffic was moving north and south on Fourth Street (27a). An examination of the pictures of this intersection, Plaintiff's Exhibit 2 (25a), will show that there is no great distance between the manhole cover and the eastbound lane of traffic for Market Street. It is not "far north" as the petitioner would have the Court believe. Certainly, the very argument itself, as stated by the petitioner on page 13, shows that a jury issue is involved because it is a matter upon which the minds of reasonable men might differ.

City of Louisville v. *Wheeler*, 301 Ky. 222, 191 S. W. 2d 386, was not overruled by *Crain* v. *City of Louisville*, 259 S. W. 2d 52. Certainly, the two cases are distinguishable on facts because in the Wheeler case the plaintiff did not see the defect because she was looking for traffic approximately thirty feet in front of her. Thus, clearly the question of her contributory negligence is one for the jury and is not one to be decided as a matter of law under the Kentucky rule. Thus, as pointed out by the Trial Court in *Sparks* v.

Western Union Telegraph Company, 141 F. Supp. 328, 331, it cannot be said, as a matter of law, that manhole covers are inherently dangerous to anyone coming in contact with them as there are covers without holes as well as with holes. Thus, the question was properly one to be submitted to the jury, as it cannot be overlooked ". . . that the particular location of manhole covers in the streets and sidewalks is extremely important in determining their potential or danger."

Stoffel v. *N. Y., N. H. & H. R. Company*, 205 F. 2d 411 (C. A. 2d), is not applicable, for there an expert lineman, knowing all the facts and circumstances, deliberately exposed himself to an electric wire that contained high voltage. Here, there was no such knowledge on the part of the plaintiff who was in the process of crossing a street which called upon her to exercise other duties than to watch the ground only. As stated in *City of Ashland* v. *Boggs*, 161 Ky. 728, 171 S. W. 461, 464, "it seems to us impossible to say, as matter of law, that one crossing a street is obliged to keep his attention fixed on the ground. The danger usually encountered is that of being run over by passing vehicles." Certainly, on this authority there is no question of assumed risk as was present in the Stoffel case, and the question of whether or not Mrs. Sparks was contributorily negligent was a jury question.

CONCLUSION.

It is respectfully submitted that the District Court and the Circuit Court of Appeals correctly decided this question of local law in accordance with the law of the State of Kentucky which was applicable in this diversity of citizenship case. Therefore, the Petition for Writ of Certiorari should be denied.

R. P. HOBSON,
JOHN P. SANDIDGE,
S. J. STALLINGS,
WOODWARD, HOBSON & FULTON,
Of Counsel.

Certificate of Service.

I, John P. Sandidge, counsel for Mary Ruth Sparks, respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on September , 1957, I served a copy of the foregoing Response to the Reply Brief on the petitioner, Western Union Telegraph Company, by that day depositing a copy thereof in a United States Post Office in a duly addressed envelope, with first-class postage thereon prepaid, addressed to its counsel of record, William Marshall Bullitt, at 1700 Kentucky Home Life Building, Louisville 2, Kentucky.

JOHN P. SANDIDGE,
1805 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Mary Ruth Sparks.